No. 15-35

In the Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to providing contraceptive coverage on religious grounds and are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. Petitioners contend, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., by requiring third parties to provide their employees with separate contraceptive coverage after petitioners opt out. The question presented is:

Whether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 793 F.3d 449. The opinion of the district court (Pet. App. 31a-88a) is reported at 988 F. Supp. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2015. The petition for a writ of certiorari was filed on July 8, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124

Stat. 119,[1] seeks to ensure universal access to quality, affordable health coverage. Some of the Act's provisions make insurance available to people who previously could not afford it. See *King* v. *Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Other reforms seek to improve the quality of coverage for all Americans, including the roughly 150 million people who continue to rely on employer-sponsored group health plans. See, *e.g.*, 42 U.S.C. 300gg-11 to 300gg-19a.[2]

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014) (*PFL*), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Ser-

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* 56 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report (*Health Benefits Survey*).

vices (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In identifying the women's preventive services to be covered, HRSA relied on recommendations from independent experts at the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2762. IOM recommended including the full range of contraceptive methods approved by the Food and Drug Administration (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associations"—including the American Medical Association and the American Academy of Pediatrics—"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments re-

sponsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury).[3]

2. Recognizing that some employers have religious objections to providing contraceptive coverage, the Departments developed "a system that seeks to respect the religious liberty" of objecting organizations "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Hobby Lobby*, 134 S. Ct. at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012). That regulatory accommodation is available to any nonprofit organization that holds itself out as a religious organization and that opposes covering some or all of the required contraceptive services on religious grounds. 45 C.F.R. 147.131(b). In light of this Court's decision in *Hobby Lobby*, the Departments have also extended the same accommodation to closely held for-profit entities that object to providing contraceptive coverage based on their owners' religious beliefs.

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[3] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans is "quickly phasing down," *PFL*, 772 F.3d at 266 n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

80 Fed. Reg. 41,324-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).[4]

a. The accommodation exempts objecting employers from any obligation to provide contraceptive coverage and instead requires third parties to make separate payments for contraceptive services on behalf of employees (and their covered dependents) who choose to use those services. 78 Fed. Reg. at 39,875-39,880.

If the employer invoking the accommodation has an insured plan—that is, if it purchases coverage from a health insurance issuer such as BlueCross BlueShield—then the obligation to provide separate coverage falls on the insurer. The insurer must "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c).

Rather than purchasing coverage from an insurer, some employers "self-insure" by paying employee health claims themselves. Self-insured employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-

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[4] "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" are exempt from the contraceptive-coverage requirement under a separate regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)).

39,880 & n.40. If a self-insured employer invokes the accommodation, its TPA "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2). The TPA may then obtain compensation for providing the required coverage through a reduction in fees paid by insurers to participate in the federally-facilitated insurance Exchanges created under the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan par-

ticipants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[5] The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The original accommodation regulations provided that an eligible employer could invoke the accommodation, and thereby opt out of the contraceptive-coverage requirement, by "self-certify[ing]" its eligibility using a form provided by the Department of Labor and transmitting that form to its insurer or TPA. *Hobby Lobby*, 134 S. Ct. at 2782; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(c)(1)(i). In light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*), the Departments have also made available an alternative procedure for invoking the accommodation.

In *Wheaton*, the Court granted an injunction pending appeal to Wheaton College, which had challenged the accommodation under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et*

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[5] A model notice informs employees that their employer "will not contract, arrange, pay, or refer for contraceptive coverage" and that the issuer or TPA "will provide separate payments for contraceptive services." HHS, *Notice of Availability of Separate Payments for Contraceptive Services*, https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Sept. 8, 2015).

seq. As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the requirements for the accommodation. *Wheaton*, 134 S. Ct. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* At the same time, the Court specified that "[n]othing in [its] order preclude[d] the Government from relying on" Wheaton's written notice "to facilitate the provision of full contraceptive coverage under the Act" by requiring Wheaton's insurers and TPAs to provide that coverage separately. *Ibid.* The government was able to do so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order in *Wheaton*, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed. Reg. at 51,092. The employer need not use any particular form and need only indicate the basis on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS and the Department of Labor notify its issuers and TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are three nonprofit religious organizations that provide health coverage for their employees, but that object to covering certain contraceptive services. Pet. App. 9a. East Texas Baptist University has a self-insured plan regulated under ERISA; Houston Baptist University and Westminster Theological Seminary (Westminster) offer coverage through ERISA-exempt church plans. *Ibid.*; Pet. 14-15.[6] Petitioners are eligible to opt out of the contraceptive-coverage requirement under the accommodation. Pet. App. 9a.

4. Petitioners filed this suit challenging the accommodation under RFRA, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. 2000bb-1. Petitioners asserted that the accommodation substantially burdens their religious exercise because the government will arrange for their TPAs to provide employees with separate contraceptive coverage if petitioners themselves opt out. The district court agreed, granting summary judgment on petitioners' RFRA claim and then entering a permanent injunction and partial final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. 29a-88a.

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[6] Westminster previously offered coverage through an insured plan, but switched to a self-insured church plan while this suit was pending. Pet. 14-15. Petitioners' challenges to the accommodation concern only their employee plans; they have not sought relief in connection with any health coverage they may arrange for their students. Cf. 45 C.F.R. 147.131(f) (providing that the accommodation is available in connection with student health plans arranged by religious colleges and universities).

5. The court of appeals consolidated this case with other RFRA challenges to the accommodation and reversed, unanimously holding that the accommodation does not substantially burden the exercise of religion. Pet. App. 1a-28a. The court explained that in determining whether a regulation imposes a substantial burden, a court may not question a claimant's characterization of its sincere religious beliefs. *Id.* at 13a. But the court held—in accordance with "all of [the other] circuits that have considered contraceptive-mandate cases"—that a reviewing court must determine, as a matter of law, whether the challenged regulation imposes a substantial burden on the claimant's religious exercise that is cognizable under RFRA. *Ibid.*; see *id.* at 13a-17a.

In this case, the court emphasized that the accommodation allows petitioners to opt out of any obligation to provide, pay for, or facilitate access to contraceptives. Pet. App. 21a-23a. Instead, the accommodation requires or encourages petitioners' TPAs to provide coverage and to do so separately from the coverage provided by petitioners. *Id.* at 22a-23a. The court concluded that petitioners' sincere objections to the actions of those third parties do not constitute a substantial burden on petitioners' exercise of religion cognizable under RFRA: "The acts that violate [petitioners'] faith are the acts of the government, insurers, and [TPAs], but RFRA does not entitle [petitioners] to block third parties from engaging in conduct with which they disagree." *Id.* at 23a.

ARGUMENT

Petitioners contend that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the

government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage. Seven courts of appeals have considered that claim, and all seven have rejected it. As those courts have explained, the accommodation is entirely consistent with RFRA and with this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which was premised on the availability of the accommodation and which did not suggest that objecting employers may prevent their employees from receiving contraceptive coverage from third parties willing to provide it. The petition should be denied.[7]

1. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that third parties provide the affected women with the coverage to which they are legally entitled. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting other important interests, such as women's interest in full and equal health coverage. As the courts of appeals to consider the question have uniformly recognized, such an ac-

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[7] Several other pending petitions present the same question. See *Geneva College* v. *Burwell*, No. 15-191 (filed Aug. 11, 2015); *Southern Nazarene Univ.* v. *Burwell*, No. 15-119 (filed July 24, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 15-105 (filed July 23, 2015); *Roman Catholic Archbishop of Wash.* v. *Burwell*, No. 14-1505 (filed June 19, 2015); *Priests for Life* v. *HHS*, No. 14-1453 (filed June 9, 2015); *Zubik* v. *Burwell*, No. 14-1418 (filed May 29, 2015).

commodation does not impose a substantial burden on the exercise of religion.

a. To opt out of the contraceptive-coverage requirement under the accommodation, an eligible employer need only take either of two actions: notify HHS that it objects to providing contraceptive coverage and identify its insurers and TPAs, or notify its insurers and TPAs directly using a form provided by the government. Taking either step relieves the employer of any obligation to provide, arrange, or pay for the coverage to which it objects. *Hobby Lobby*, 134 S. Ct. at 2763. The government instead places the responsibility to provide separate coverage on insurers and TPAs—or, if the employer has an ERISA-exempt church plan, the government offers to compensate TPAs if they provide separate coverage voluntarily. 79 Fed. Reg. at 51,095 n.8; see p. 6, *supra*. The accommodation thus "effectively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

Petitioners do not object to notifying their insurers and TPAs that they have religious objections to providing contraceptive coverage. They have done so in the past and presumably would continue to do so even if they obtained the relief they seek here, in order to ensure that petitioners themselves did not provide contraceptive coverage. See Pet. App. 38a-42a. Petitioners also do not object to notifying the government of their objection and identifying their TPAs—in fact, they have done so in this litigation. *Ibid.* Petitioners' objection thus is not to "the acts *they* are required to perform" in order to invoke the accommodation, but instead to the actions of the government and TPAs, consistent with federal law, that

would occur after petitioners themselves opted out. *Id.* at 18a. As the court of appeals explained, however, "RFRA does not entitle [petitioners] to block third parties from engaging in conduct with which they disagree." *Id.* at 23a.

Every other court of appeals to consider the issue has reached the same conclusion, likewise holding that "religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." *Priests for Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015); accord *Grace Schools* v. *Burwell*, No. 14-1430, 2015 WL 5167841, at *17 (7th Cir. Sept. 4, 2015); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, No. 13-2723, 2015 WL 4979692, at *12 (6th Cir. Aug. 21, 2015); *Catholic Health Care Sys.* v. *Burwell*, No. 14-427, 2015 WL 4665049, at *14-*16 (2d Cir. Aug. 7, 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, No. 13-1540, 2015 WL 4232096, at *30 (10th Cir. July 14, 2015) (*Little Sisters*), reh'g en banc denied, 2015 WL 5166807 (10th Cir. Sept. 3, 2015), petitions for cert. pending, Nos. 15-105 and 15-119 (filed July 23 and 24, 2015); *Wheaton College* v. *Burwell*, 791 F.3d 792, 799-801 (7th Cir. 2015) (*Wheaton*); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015) (*Notre Dame*); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir. 2015), petitions for cert. pending, Nos. 14-1418 and 15-191 (filed May 29 and Aug. 11, 2015).

b. Petitioners err in asserting (Pet. 23-32) that those decisions departed from this Court's guidance in *Hobby Lobby* by questioning the objecting employers' religious judgment that the accommodation is inconsistent with their beliefs. *Hobby Lobby* reiterated that it is not the function of the courts to "say that [a RFRA claimant's] religious beliefs are mistaken or insubstantial." 134 S. Ct. at 2779. But that is not what the courts of appeals have done. Like its sister circuits, the court of appeals emphasized that it was not questioning petitioners' religious beliefs about the accommodation. Pet. App. 17a, 24a-25a; see also, *e.g.*, *Catholic Health Care Sys.*, 2015 WL 4665049, at *7, *14; *Little Sisters*, 2015 WL 4232096, at *19; *PFL*, 772 F.3d at 247. Instead, the court held that petitioners' sincere objections do not establish a substantial burden on their religious exercise because, *as a legal matter*, RFRA does not permit religious adherents to "challenge the independent conduct of third parties." Pet. App. 28a.

That conclusion follows from decisions establishing that a religious adherent "may not use a religious objection to dictate the conduct of the government or of third parties." *PFL*, 772 F.3d at 246; see Pet. App. 14a-16a. This Court has made clear, for example, that the free exercise of religion "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986); see *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-452 (1988). For similar reasons, "RFRA does not prevent the government from reassigning obligations after an objector opts out simply because the objector strongly

opposes the ultimate goal of the generally applicable law." *Little Sisters*, 2015 WL 4232096, at *30.

Petitioners may sincerely believe that invoking the accommodation would make them complicit in objectionable conduct by the government and by others, but RFRA does not permit them to collapse the *legal* distinction between requirements that apply to them and the government's arrangements with third parties. See *Roy*, 476 U.S. at 701 n.6 ("Roy's religious views may not accept this distinction between individual and governmental conduct. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction.") (citation omitted). As Judge Smith explained for the unanimous panel below, petitioners' contrary view would "subject a wide range of federal programs to strict scrutiny," creating an "endless" potential for RFRA claims that Congress could not have intended to authorize. Pet. App. 24a.

It would be particularly inappropriate to hold that the government's dealings with third parties create a substantial burden where, as here, the government is acting to fill a gap left because petitioners themselves have chosen to opt out of a requirement to which they object on religious grounds. In our pluralistic society, it is not unusual to allow religious objectors to claim exemptions from generally applicable requirements while obligating others to fill their shoes. *Little Sisters*, 2015 WL 4232096, at *16; see *id.* at *24 & n.31 (collecting examples of "the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors"). Under petitioners' view, however, all such accommodations could be recast as substantial burdens on the exercise of reli-

gion and subjected to strict scrutiny. For example, "a religious conscientious objector to a military draft" could claim that being required to claim conscientious-objector status constitutes a substantial burden on his exercise of religion because it would "'trigger' the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war." *PFL*, 772 F.3d at 246 (citation omitted); see *Geneva College*, 778 F.3d at 439 n.14 (providing a similar example of a religious adherent who objects to requesting time off on the Sabbath because his employer will require someone else to work in his place).

That sweeping understanding of RFRA is inconsistent with our Nation's traditions and finds no support in this Court's precedents. "When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, [the objectors] are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met." *Little Sisters*, 2015 WL 4232096, at *26.

c. Petitioners' RFRA claims do not depend on the details of the accommodation. Instead, they appear to object to *any* system in which the government requires them to take action to opt out of the contraceptive-coverage requirement and responds to that opt-out by ensuring that the affected women receive separate contraceptive coverage from others —no matter how the government identifies or structures its arrangements with those third parties. Cf. Pet. 1-2, 32. But although petitioners make clear (Pet. 32) that disputes about the particular workings of the accommodation at issue here are "beside the point,"

they also mischaracterize the accommodation in numerous respects.

For example, petitioners assert (Pet. 12) that an objecting organization's self-certification or notice to HHS "triggers and authorizes provision of [contraceptive] coverage." In fact, as the courts of appeals have emphasized, "*[f]ederal law*, rather than any involvement by [petitioners] in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and [TPAs] to provide coverage for contraceptive services." *Geneva College*, 778 F.3d at 437; see, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *22 (same). Petitioners need only register their objection and claim an opt-out; *the government* then requires insurers and TPAs to take their place.

Relatedly, petitioners state (Pet. 11-12, 31-32) that the augmented accommodation procedure requires self-insured employers to execute an instrument that has the legal effect of designating their TPAs as the entities responsible for providing contraceptive coverage. That is incorrect. Under the original version of the accommodation, an objecting organization opted out by completing a form provided by the Department of Labor and sending the form to its insurer or TPA. 29 C.F.R. 2590.715-2713A(a)(1) (2014). The form, known as EBSA Form 700, required the objecting organization only to certify its eligibility for the accommodation; the reverse side then referred a TPA receiving the form to the regulations setting forth its obligations. See *Wheaton College* v. *Burwell*, 134 S. Ct. 2806, 2816 (2014) (appendix to the dissenting opinion of Sotomayor, J.). For self-insured employers, the form was treated as an "instrument under which the plan is operated" that, among other things, had the

legal effect of designating the TPA as the plan "administrator" responsible for providing contraceptive coverage under ERISA. 29 C.F.R. 2510.3-16(b) (2014); see 29 U.S.C. 1002(16)(A) (defining a plan "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated").[8]

Under the augmented accommodation regulations issued in August 2014, an objecting employer can opt out by providing notice to HHS rather than sending EBSA Form 700 to its TPA. 29 C.F.R. 2590.715-2713A(b)(ii). If an employer opts out using that alternative procedure, its notice to HHS is a plan instrument that invokes the opt-out and excuses the employer from the obligation to provide contraceptive coverage. *Ibid.* DOL then sends a *separate* notification to the TPA, and the regulations provide that "[s]uch notification from [DOL] shall be an instrument under which the plan is operated" and shall serve to designate the TPA as the plan administrator responsible for providing contraceptive coverage. 29 C.F.R. 2510.3-16(b); see 80 Fed. Reg. at 41,323.

Petitioners also err in asserting (*e.g.*, Pet. 30) that under the accommodation, contraceptive coverage is provided "via the religious employers' own plans." If an objecting employer has an insured plan, the regulations provide that the insurer must "*[e]xpressly ex-*

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[8] Although Section 1002(16)(A) refers to a singular plan "instrument," ERISA plans can be—and typically are—operated under multiple "instruments." See *Pettaway* v. *Teachers Ins. & Annuity Ass'n of Am.*, 644 F.3d 427, 433-434 (D.C. Cir. 2011). The term "encompasses [the] formal or legal documents under which a plan is set up or managed." *Faircloth* v. *Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996), cert. denied, 519 U.S. 1077 (1997).

clude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and must instead "[p]rovide separate payments" for contraceptive services. 45 C.F.R. 147.131(c)(2)(i) (emphases added). Similarly, if the employer has an ERISA-exempt self-insured church plan—as Houston Baptist and Westminster do—then its TPA does not become the plan administrator by operation of 29 C.F.R. 2510.3-16(b), and any contraceptive coverage voluntarily provided by the TPA therefore has no connection to the employer's plan. If the objecting employer has a self-insured plan, the contraceptive coverage provided by its TPA is, as an ERISA matter, part of the same ERISA plan as the coverage provided by the employer. See 78 Fed. Reg. at 39,879-39,880. But the employer neither funds nor controls that separate coverage—instead, the TPA does so. 29 C.F.R. 2510.3-16(b) and (c); see 78 Fed. Reg. at 39,879-39,880; *Wheaton*, 791 F.3d at 800. And the TPA must make clear to employees that the employer plays no role in the provision of the coverage to which it objects. 29 C.F.R. 2590.715-2713A(d); see n.5, *supra*.

Petitioners do not explain how the ERISA status of separate contraceptive coverage provided by their TPAs would burden their religious exercise. And in any event, neither that nor any other feature of the accommodation specific to self-insured employers could constitute a substantial burden under RFRA: If petitioners object to those aspects of the accommodation, they "could avoid the situation they deem objectionable by employing an insured plan." *Little Sisters*, 2015 WL 4232096, at *24 n.32.

Finally, petitioners repeatedly emphasize (Pet. 12) that an employer that invokes the accommodation is "deemed to comply" with the contraceptive-coverage requirement. See, *e.g.*, Pet. i, 2, 7, 20, 23, 24, 30-31. But petitioners do not—and could not—suggest that being deemed to comply with an objectionable requirement imposes a substantial burden on a religious objector excused from *actual* compliance. And, as demonstrated above, the accommodation ensures that objecting employers play no role in the actual provision of contraceptive coverage.

2. Even if petitioners could establish a substantial burden on their exercise of religion, the accommodation would satisfy RFRA scrutiny because, as the D.C. Circuit held, "the regulatory opt-out mechanism is the least restrictive means to serve compelling governmental interests." *PFL*, 772 F.3d at 237; see *id.* 256-267; *Notre Dame*, 786 F.3d at 616-618.

a. The accommodation furthers "the government's compelling interest in providing women full and equal benefits of preventive health coverage," *PFL*, 772 F.3d at 264, and in filling the gaps in the Affordable Care Act's comprehensive regulatory scheme created when religious objectors opt out. Although this Court was not required to decide the issue in *Hobby Lobby*, see 134 S. Ct. at 2780, five Justices recognized that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-2786 (Kennedy, J., concurring); accord *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).

As Judge Kavanaugh has explained, "[i]t is not difficult to comprehend why a majority of the Justices" reached that conclusion. *Priests for Life* v. *HHS*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *65-*66 (D.C. Cir. May 20, 2015) (*PFL II*) (Kavanaugh, J., dissenting from the denial of rehearing en banc). Contraceptive coverage "enables women to avoid the health problems unintended pregnancies may visit on them and their children"—problems that are particularly acute for women with medical conditions that render pregnancy "hazardous, even life threatening." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting). "About 50% of all pregnancies in the United States are unintended." *PFL II*, 2015 U.S. App. LEXIS 8326, at *66 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Reducing unintended pregnancies by making it easier for women to obtain the most effective and appropriate forms of contraception for them would not only "further women's health," but also "advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age." *Ibid.*; see *PFL*, 772 F.3d at 257-264; *Notre Dame*, 786 F.3d at 608; *IOM Report* 102-109.

b. The accommodation is the least restrictive means of furthering the compelling interests at stake. The Departments engaged in an extensive rulemaking process that included multiple rounds of public comment and consultation with "representatives of religious organizations, insurers, women's groups, insurance experts, and other interested stakeholders." 77 Fed. Reg. at 16,503. They considered a wide variety

of alternative approaches, but concluded that those alternatives "were not feasible and/or would not advance the government's compelling interests as effectively" as the accommodation. 78 Fed. Reg. at 39,888.

Petitioners assert (Pet. 33-34) that the government could instead provide contraceptive coverage to their employees through other means, such as by offering free contraceptive coverage on the Affordable Care Act's health insurance Exchanges. But petitioners have not stated that those alternatives would resolve their religious objections to the accommodation, which would appear to apply to *any* system in which their employees gain an entitlement to contraceptive coverage from third parties after petitioners opt out—including a system in which the result of petitioners invoking an opt-out was that their employees became eligible for coverage through the Exchanges.

Unlike *Hobby Lobby*, moreover, this is not a case in which a proposed less-restrictive alternative is "an existing, recognized, workable, and already-implemented framework to provide coverage." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). This Court explained that accepting the RFRA challenge in *Hobby Lobby* "need not result in any detrimental effect on any third party" because the accommodation already in place for religious nonprofit organizations could be extended to closely held for-profit companies. *Id.* at 2781 n.37. The Court thus repeatedly emphasized that the effect of its decision on female employees and beneficiaries "would be precisely zero." *Id.* at 2760; see *id.* at 2759, 2782-2783. Here, in contrast, petitioners seek to invalidate the very regulatory accommodation that *Hobby Lobby* identified. And all of the alternatives that have been

suggested would require Congress to establish "a whole new program" of contraceptive coverage, *id.* at 2786 (Kennedy, J., concurring), or to significantly modify an existing program. Unless Congress took such action, women who rely on objecting employers for their health coverage would be denied coverage.

In addition, even if petitioners' proposed alternatives to the accommodation were ultimately enacted by Congress, those alternatives would not "equally further[] the Government's interest," *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), or "protect the asserted needs of women as effectively" as the accommodation, *id.* at 2782 (majority opinion). At a minimum, the alternatives would require women to "take steps to learn about, and to sign up for, a new government funded and administered health benefit." *Id.* at 2783 (citation omitted). They would also require women to "identify different providers or reimbursement sources" or to "pay out of pocket and wait for reimbursement." *PFL*, 772 F.3d at 265; accord *Notre Dame*, 786 F.3d at 616-617.

Those burdens would constitute a substantial barrier to full and equal health coverage for women. The point of requiring coverage of preventive services without cost-sharing is that even small burdens impair access to those services. The Departments explained that "[r]esearch * * * shows that cost sharing can be a significant barrier to effective contraception," 77 Fed. Reg. at 8728, and that "[i]mposing additional barriers to women receiving the intended coverage * * * by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women," 78 Fed. Reg. at 39,888; see *id.* at 39,873; *IOM Report* 18-20,

109. Those barriers would also deny women *equal* access to health coverage that is appropriate to their needs—a central purpose of the Act's specific provision for women's preventive services. *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); *PFL*, 772 F.3d at 235. Accordingly, as the D.C. Circuit explained, "[p]roviding contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest." *PFL*, 772 F.3d at 265.

The accommodation serves that interest while allowing objecting employers to opt out of any role in affording the coverage. In contending that even more is required, and that RFRA grants them a right to prevent the affected women from obtaining separate coverage from third parties, petitioners disregard this Court's admonition that courts applying RFRA "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

3. Petitioners note (Pet. 3, 21) that this Court has granted interim relief to parties challenging the accommodation, most recently in *Wheaton* and *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015). Although the Court cautioned that those interim orders should not be construed as an expression of its views of the merits,

the orders further confirm that the accommodation is consistent with RFRA.

Nothing in this Court's interim orders in *Wheaton* and *Zubik* suggested that RFRA grants objecting employers a right to prevent employees from receiving contraceptive coverage from third parties. To the contrary, the Court expressly stated that its orders did not "preclude the Government from relying on information provided by the [employers], to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Zubik*, 135 S. Ct. at 2924; see *Wheaton*, 134 S. Ct. at 2807. The Court therefore emphasized that its orders would not "affect[] the ability of * * * employees to obtain, without cost, the full range of FDA approved contraceptives." *Ibid.*

In light of the *Wheaton* order, moreover, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one this Court's interim orders provided to the challengers in *Wheaton* and *Zubik*. Like those organizations, any eligible employer (including a closely held for-profit company) may now opt out of the contraceptive-coverage requirement by informing HHS that it objects to providing contraceptive coverage and is eligible for the accommodation. 29 C.F.R. 2590.715-2713A(b)(1)(ii) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). And as under this Court's interim orders, the employer need not use a particular form to notify the government of its objection, and it need not send a form to its insurers and TPAs. *Ibid.*

In dissenting from the denial of rehearing en banc in *PFL*, Judge Kavanaugh suggested that the augmented accommodation is not the least restrictive

means of serving the government's compelling interests because it requires an objecting employer to identify its insurers and TPAs—information that this Court did not require in *Wheaton* and *Zubik*, or in a similar interim order issued prior to *Hobby Lobby* in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 1022 (2014). See *PFL II*, 2015 U.S. App. LEXIS 8326, at *67-*75. Judge Kavanaugh inferred from this Court's interim orders that "the Government can independently determine the identity of the [objecting] organizations' insurers [and TPAs]." *Id.* at *70. Therefore, although he emphasized that "[t]he Government may of course continue to require the religious organizations' *insurers* [*and TPAs*] to provide contraceptive coverage to the religious organizations' employees," he would have required the government to allow objecting employers to invoke the accommodation without identifying those third parties. *Id.* at *75-*76.

Petitioners do not adopt Judge Kavanaugh's position, presumably because it would not address their religious objections to a system in which, after petitioners themselves opt out, their employees receive contraceptive coverage from petitioners' TPAs. In any event, Judge Kavanaugh's dissent rested on a mistaken premise. He appeared to assume that the interim orders in *Wheaton* and *Zubik* did not require the challengers to identify their insurers and TPAs because the government is able to determine that information "independently." *PFL II*, 2015 U.S. App. LEXIS 8326, at *70. But as this Court was aware, the government knew the identities of the relevant insurers and TPAs in *Wheaton* and *Zubik* because the challengers themselves had already provided that

information in the course of the litigation. *Wheaton*, 134 S. Ct. at 2815 (Sotomayor, J., dissenting); Mem. for Resps. in Opp. at 31 & n.17, *Zubik*, *supra* (No. 14A1065). The government does not have records of employers' insurers and TPAs as a general matter, and neither the Departments nor public commenters have identified "any alternative means the Departments c[ould] use to obtain the required information" if it were not provided by objecting employers. 80 Fed. Reg. at 41,323.

The information required by the alternative notice procedure thus "represents the minimum information necessary" for the Departments to administer the accommodation. 80 Fed. Reg. at 41,323. That information is neither religious in nature nor confidential. RFRA does not confer a right on a religious employer to withhold that limited factual information from the Departments responsible for implementing the Affordable Care Act. Furnishing such information is, rather, the kind of routine administrative task that may be required of a religious objector "in the administration of governmental programs." *Little Sisters*, 2015 WL 4232096, at *30.

4. The court of appeals correctly rejected petitioners' RFRA challenge to the accommodation. Its decision was entirely consistent with this Court's decision in *Hobby Lobby* and with the Court's interim orders in *Wheaton* and *Zubik*. All six other circuits that have decided the issue agree. This Court's review of the question presented is therefore unwarranted. But even if that question otherwise warranted certiorari, this case would not be an appropriate vehicle in which to consider it for several reasons.

First, as of the date of this filing, the decision below remains subject to a petition for rehearing en banc filed by other parties to the consolidated cases before the court of appeals. 14-10241 Docket entry (Aug. 3, 2015). It would be unusual for this Court to grant a petition for a writ of certiorari to review a decision that is still under consideration in the court below.

Second, this case does not present the full range of coverage arrangements that have given rise to RFRA challenges to the accommodation. The accommodation operates somewhat differently with respect to insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. See pp. 5-6, 18-19, *supra*. Some judges have concluded that those differences are material to the RFRA analysis. See, *e.g.*, *Little Sisters*, 2015 WL 4232096, at *41 (Baldock, J., dissenting in part); *Roman Catholic Archbishop of Washington* v. *Sebelius*, 19 F. Supp. 3d 48, 72-85 (D.D.C. 2013). Because petitioners all have self-insured plans, this case does not present the validity of the accommodation as applied to insured plans.

Third, the decision below addresses only the question whether the accommodation imposes a substantial burden on the exercise of religion; it does not consider whether the accommodation qualifies as the least restrictive means of furthering a compelling government interest. That would make this case a less suitable vehicle than one in which all of the potentially dispositive issues were addressed by the decision below. See *Cutter*, 544 U.S. at 718 n.7 (this Court "is a court of review, not of first view"); cf. Br. in Opp. at 30-31, *Priests for Life* v. *HHS* and *Roman Catholic*

Archbishop of Washington v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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